

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CRA-S-4493-SB-2016 (O&M)
Date of decision : 18.08.2018**

Kamal Tiwari

...Appellant

Versus

State of Punjab

...Respondent

CORAM:- HON'BLE MR. JUSTICE JITENDRA CHAUHAN

Present: Mr. Vishwajeet Mehta, Advocate
for the appellant.

Ms. Harsimrat Rai, DAG, Punjab.

JITENDRA CHAUHAN, J.

The instant appeal is directed against the judgment and order dated 20.10.2016 passed by Judge, Special Court, Patiala (hereinafter referred to as 'the trial Court') whereby, the appellant was convicted under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') and sentenced to undergo rigorous imprisonment for ten years with fine of ₹100,000/- with default stipulation.

Brief facts of the present case as noticed in the judgment passed by the trial Court are as under:-

“On 14.09.2013 ASI Sukhdev Singh along with HC Devinder Singh, HC Gurmit Singh and HC Dilbagh Singh on private vehicle in connection with patrolling and checking of bad elements were coming

towards Thapar University from Gurdwara Dukhnivaran Sahib, Patiala via Passi Road. When the police party reached near water tank, one clean shaven person was seen standing on the road. On seeing the police party that person became perplexed and started hastily walking towards Baba Jiwan Bast. On suspicion ASI Sukhdev Singh got the vehicle stopped and with the help of other police officials apprehended him. The identity of the said person was verified. On asking he told his name as Kamal Tiwari son of Tarveni Parshad resident of House No.D-1, Baran Kuan, Patiala. ASI Sukhdev Singh disclosed his identity to the said person (accused) and further told him that it is suspected that some contraband is in possession of the accused. ASI Sukhdev Singh apprised the accused regarding his legal right that search can be conducted in the presence of some Gazetted Officer or Magistrate and told that they can be called at the spot. But after thinking for sometime the accused reposed faith upon ASI Sukhdev Singh. The consent statement of accused Ex.PA was recorded which was signed by accused and witnessed by HC Devinder Singh and HC Gurmit Singh. From the search of the accused intoxicant tablets of white colour wrapped in glazed paper were recovered from the left pocket of his pants worn by him. Then two samples of 10 tablets each were separated from the bulk and the remaining on counting came to be 1230 tablets. The bulk and samples were converted into parcels were sealed by ASI Sukhdev Singh with his seal bearing impression SS. Specimen seal Ex.P1 was prepared and seal after its use handed over to HC Devinder Singh.

The incriminating articles were taken into possession vide memo Ex.PB which was witnessed by HC Deviinder Singh and HC Gurmit Singh. Ruqa Ex.PE was sent to police Station through HC Dilbagh Singh and FIR Ex.PF was registered. Rough site plan Ex.PG of the place of recovery was prepared. The accused arrested vide memo Ex.PD and personal search was conducted vide memo Ex.PC. After completing the investigation at the spot, Investigating Officer ASI Sukhdev Singh produced the accused along with case property, specimen seal Ex.P1, articles recovered during the personal search of accused and witnesses before Inspector Narain Singh SHO of P.S.Civil Lines, Patiala. He verified the facts of the case and sealed the case property with his seal bearing impression NS. Thereafter, SHO deposited the case property with MHC Bikram Singh with seals intact. On the next day ASI Sukhdev Singh took the case property from the MHC and produced the accused along with case property before learned JMIC (D), Patiala with application for remand Ex.PJ, application for inventory Ex.PX and application for depositing the case property in judicial malkhana Ex.PL. The learned Magistrate saw and signed the case property and the same was handed over to ASI Sukhdev Singh for depositing the same in judicial malkahana, Patiala vide order Ex.PL/1. Thereafter, ASI Sukhdev Singh redeposited the entire case property with the MHC as the judicial malkhana was closed due to Sunday. On 16.09.2013 HC Devinder Singh took the bulk parcel and one sample parcel from the MHC and deposited the same in judicial malkhana at Patiala. The

sample was sent to the laboratory on 24.09.2013 through HC Devinder Singh and after receipt of Chemical Examiner Ex.PM the report under Section 173(2) Code of Criminal Procedure was presented against the accused.”

The accused was charged with offence under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to which he pleaded not guilty and claimed trial.

In support of its case, the prosecution has examined HC-Devinder Singh as PW-1, SI Narain Singh as PW-2, ASI Sukhdev Singh as PW-3, HC Bikram Singh as PW-4, and HC Devinder Singh as PW-5.

Thereafter, statement of the accused under Section 313 Cr.P.C was recorded and entire incriminating circumstances appearing in the prosecution evidence were put to the accused to which he denied and implied false implication. He examined HC Bikram Singh as DW-1 in his defence.

After appraisal of the evidence, learned trial Court convicted the accused-appellant under Section 22 of the NDPS Act and sentenced to undergo imprisonment as narrated above.

Feeling aggrieved against the judgement and conviction and the order of sentence passed by learned trial Court, the instant appeal has been filed by the accused/appellant.

Learned counsel contends that the petitioner has been falsely implicated in the instant case. The investigation conducted by the

prosecuting agency is tainted. The FIR in the instant case was registered on the basis of Ruqa sent by ASI Sukhdev Singh, who also conducted the investigation. The provisions of Section 50 of the NDPS Act have not been complied with. There is an unexplained delay of 10 days in sending the samples to the FSL. No independent witness was joined by the investigating officer. The link evidence is missing in the instant case as the pants from which the contraband was recovered was not taken into possession.

On the other hand, the learned State counsel supports the judgement of conviction and order of sentence passed by the trial Court and submits that the accused-appellant has been rightly convicted the sentenced. It is submitted that the petitioner was apprehended from the spot. No previous enmity or motive has been alleged or proved by the appellant. The provisions of Section 50 of the NDPS Act were adhered to as the appellant was made aware of his legal right before conducting his search.

I have heard the arguments of the learned counsel for the parties and have carefully gone through the record of the case.

As per the prosecution story, 1250 intoxicating tablets, wrapped in a glazed paper, were recovered from the left side pocket of the pants worn by the appellant at the time of recovery. However, the link evidence in the instant case is missing. The pants of the appellant were not taken into possession and thus, the fact whether the size of the pocket was big enough to accommodate 1250 number of tablets, has not been established on record.

The other vital aspect of the matter is regarding compliance or otherwise, of Section 50 of the NDPS Act, which reads thus:-

50. Conditions under which search of persons shall be conducted

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in Sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled

substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6)After a search is conducted under Sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

As per the case of the prosecution, ASI Sukhdev Singh apprised the accused regarding his legal right to be searched in the presence of some Gazetted Officer or a Magistrate, however, the appellant reposed faith upon ASI Sukhdev Singh. The consent statement of accused was recorded as Ex.PA. In a recent judgment rendered by Hon'ble the Supreme Court in ***Arif Khan @ Agha Khan Vs. State of Uttarakhand, Criminal Appeal No.273 of 2007, decided on 27.04.2018***, their Lordships have held as under:-

“24. Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed under [Section 50](#) of the NDPS Act while making search and recovery of the contraband “Charas” from the appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of

contraband “Charas” from the appellant in conformity with the requirements of [Section 50](#).

25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under [Section 50](#) in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of [Section 50](#) stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the [NDPS Act](#).

*27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband “Charas” does not satisfy the mandatory requirements of [Section 50](#) as held by this Court in the case of *Vijaysinh Chandubha Jadeja* (supra). This we say for the following reasons.*

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband

“Charas” was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband “Charas” from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband “Charas” as provided under [Section 50](#) of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of [Section 50](#) of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of them deposed that the search/recovery was made in presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under [Section 50](#) of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under [Section 50](#) of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the

compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.”

In the instant case, admittedly, the search and recovery was not made in the presence of a Gazetted Officer or a Magistrate, therefore, the provisions of Section 50 of the NDPS Act have not been complied with.

Another defect in the prosecution story is that the complainant in the instant case is also the Investigating Officer. The FIR in question was registered on the basis of ruqa sent by ASI Sukhdev Singh, who also carried out investigation in the matter. In ***Megha Singh Vs. State of Haryana, 1996(11) SCC 709***, it has been laid down as under:-

“4. After considering the facts and circumstances of the case, it appears to us that there is discrepancy in the depositions of the P.Ws. 2 and 3 and in the absence of any independent corroboration such discrepancy does not inspire confidence about the reliability of the prosecution case. We have also noted another disturbing feature in this case. PW-3, Siri Chand, head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161, Cr.P.C. Such

practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.”

(Emphasis supplied)

The aforesaid view was reiterated by of Hon'ble the Supreme Court in a recent judgment passed in ***Mohan Lal Vs. State of Punjab, Criminal Appeal No.1880 of 2011, decided on 16.08.2018***, it has been observed as under:-

25. *In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of the case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is, therefore, held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.”*

In view of the above discussion, this Court has no

hesitation to hold that the recovery proceedings in the instant case stand vitiated for the reasons enumerated above. Consequently, the instant appeal is allowed; the impugned judgment and order passed by the trial Court are set aside; and the accused is acquitted of the charges framed by giving the benefit of doubt.

Allowed.

(JITENDRA CHAUHAN)
JUDGE

18.08.2018

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Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No